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No. 83-1021

In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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REPLY BRIEF FOR THE APPELLANT

1. With respect to this Court's jurisdiction, appellee does not dispute our submission in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983), that a direct appeal may not be taken to this Court under 28 U.S.C. 1252 if the appellant does not challenge the district court's holding that a provision of an Act of Congress is unconstitutional but instead challenges only the relief ordered by the district court. Appellee instead argues that this case is distinguishable from *Edwards* because here the Commission does seek review of the lower court's constitutional holding. Mot. to Aff. 4-6. Appellee is wrong.

The Commission concedes that the one-House legislative veto provision in the Reorganization Act of 1977 (5 U.S.C. 906) is unconstitutional in light of this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), and does not seek appellate review of that constitutional holding, just as the Secretary conceded in *Edwards* that Section 211(a)(5)(A)

of the Social Security Act, 42 U.S.C. 411(a)(5)(A), is unconstitutional and did not seek appellate review of that holding. Like the Secretary in *Edwards*, the Commission seeks review only of the district court's remedial order — in this case, the district court's dismissal of the Commission's enforcement action. As we explain in the Jurisdictional Statement (at 7-8), the correctness of that dismissal raises questions solely of statutory construction and appropriate judicial relief, not the constitutionality of an Act of Congress, for which the direct appeal mechanism was intended.

In arguing otherwise, appellee seems to be of the view that if an unconstitutional provision of an Act of Congress is found not to be severable, then the entire Act is unconstitutional. See Mot. to Aff. 5. This argument is incorrect. There is no constitutional defect in any provision of the Reorganization Act other than its legislative veto section, since Congress clearly may authorize the President to transfer functions between agencies of the Executive Branch. The question of severability and of the continuing force of the remainder of the Act is purely one of legislative intent: whether Congress would have enacted the remainder of the Act without its unconstitutional provision, so that a court may continue to give effect to the remainder. See *INS* v. *Chadha*, slip op. 10-14; *City of New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976).[1]

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[1]Appellee relies (Mot. to Aff. 5) on the district court's statement that "the entire Act must be held unconstitutional in that the one-house veto provision was enacted as an integral and inseparable part of the grant of power to the President" (J.S. App. 14a). It is clear, however, that the district court engaged in a routine severability analysis. See *id.* at 9a-14a. The substance of the court's actions, not the label the court attached to the conclusion it reached, must control the question of this Court's jurisdiction under 28 U.S.C. 1252 (cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982)), and here the district

Equally without merit is appellee's peculiar suggestion (Mot. to Aff. 5-6) that this case is distinguishable from *Edwards* because there the Secretary conceded the unconstitutionality of the statutory provision in a nationwide class action, while here the Secretary conceded the unconstitutionality of the statutory provision in a case involving only a single employer. The Commission in fact has conceded the unconstitutionality of the legislative veto device in numerous other enforcement actions as well (see note 2, *infra*), and such concessions (and the determination in each case not to appeal the holding of unconstitutionality) have the same nationwide impact as the concession in *Edwards*. Moreover, the Secretary in *Edwards* did challenge the district court's nationwide remedial order, just as the Commission will challenge in this and any similar case a remedial order dismissing its enforcement action. There is, in short, no distinction between this case and *Edwards* insofar as this Court's jurisdiction under 28 U.S.C. 1252 is concerned.

2. Should the Court nevertheless reach the merits of this appeal, we note that the weight of authority is now decidedly against appellee's position. Since the Jurisdictional Statement was filed, there have been six additional district court decisions declining to dismiss enforcement actions brought by the Commission under the Equal Pay Act or the

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court did not purport to find any independent constitutional defect in the remainder of the Act.

Appellee's misunderstanding of the relevant legal principles also explains its assertion (Mot. to Aff. 4) that "the government continues to 'defend the constitutionality' of the Reorganization Act." But it could equally have been said in *Edwards* that the government continued to "defend the constitutionality" of Section 211(a)(5) of the Social Security Act, once the gender-based income attribution provision had been severed.

Age Discrimination in Employment Act.[2] Only one additional decision supports appellee's position, and the district court in that case simply incorporated the decision of the court below without engaging in any independent analysis. *EEOC* v. *Westinghouse Electric Corp.*, Civ. No. 83-1209 (W.D. Pa. Jan. 5, 1984).[3] Moreover, as we shall briefly explain, appellee's arguments in support of the district court's dismissal of the instant suit are seriously flawed.

a. Appellee does not directly answer our submission (J.S. 9-13) that, under the terms of the Reorganization Act, a reorganization plan that was not vetoed by either House of Congress should not be invalidated simply because the unexercised legislative veto authority in 5 U.S.C. 906 has now been held to be unconstitutional. Appellee's only response is that, under *Chadha*, legislative silence in the form of a failure by either House to veto Executive action cannot be regarded as the equivalent of the affirmative bicameral approval and presentment to the President

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[2] *EEOC* v. *Jackson County*, No. 83-1118-CV-W-1 (W.D. Mo. Dec. 13, 1983) (holding that the one-House veto provision is severable and that Congress in any event ratified the transfer of authority to the EEOC); *EEOC* v. *City of Memphis*, No. 83-2672-MA (W.D. Tenn. Dec. 29, 1983) (same); *EEOC* v. *El Paso Natural Gas Co.*, No. EP-83-CA-108 (W.D. Tex. Jan. 16, 1984) (same); *EEOC* v. *Chrysler Corp.*, No. 81-72347 (E.D. Mich. Jan. 23, 1984) (rejecting severability and ratification arguments, but concluding that *Chadha* should not be applied retroactively); *EEOC* v. *Cudahy Foods Co.*, No. C83-855V (W.D. Wash. Dec. 28, 1983) (motion to dismiss denied without explaining reasoning); *EEOC* v. *CBS, Inc.*, No. 81 Civ. 2781 (JES) (S.D.N.Y. Jan. 24, 1984) (same; question certified for interlocutory appeal pursuant to 28 U.S.C. 1292(b)). A seventh decision, *Muller Optical Co.* v. *EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983), appeal pending, No. 83-5889 (6th Cir.), was discussed in the Jurisdictional Statement (at 7 n.4, 10 n.5 & 13).

[3] On January 30, 1984, the Commission filed protective notices of appeal both to this Court and to the court of appeals (No. 84-3073 3d Cir.) from the district court's decision in *Westinghouse*.

required by the Constitution. See Mot. to Aff. 8-9 & n.7. Appellee misses the point.

The question here is not whether the legislative veto device is constitutional; obviously it is not. Rather, the question is what effect Congress would have intended the holding of unconstitutionality to have on the remainder of the Reorganization Act and on reorganization plans promulgated pursuant to that Act.[4] It is equally obvious that Congress concluded when it passed the Reorganization Act that a reorganization plan that was not vetoed by either of its Houses would carry sufficient indicia of congressional "approval" that the plan should go into effect. See J.S. 10-12. There is no reason to believe that Congress would have intended this "approval" of the plan to be rescinded if a court subsequently held unconstitutional the legislative

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[4]Citing *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936), appellee contends (Mot. to Aff. 7) that the absence of a severability clause in the Reorganization Act creates a presumption against severability. But this Court has not recognized any such presumption in its recent severability cases. To the contrary, in *Chadha* itself, the Court once again reaffirmed the settled rule that "the invalid portions of a statute are to be severed 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Slip op. 10 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)). The Court in *Chadha* concluded that Congress had furnished an answer to that question by inserting a severability clause in the statute, which the Court also described as creating a presumption of severability (slip op. 12). But the absence of such a clause does not create a contrary presumption. In either case, the ultimate inquiry is the same: whether it is "evident" that Congress would not have enacted the valid portions independently of the invalid provision. See *United States* v. *Jackson*, 390 U.S. 570, 585 & n.27 (1968); *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 441-442 (D.C. Cir. 1982) (en banc), aff'd, No. 81-2008 (July 6, 1983). Appellee plainly has not shown that it is "evident" that Congress intended completed reorganization plans to be invalidated because of the latent legislative veto defect in the Reorganization Act.

veto authority that Congress did not even find it necessary to exercise. To the contrary, the Reorganization Act on its face accords a special finality and stature to a reorganization plan that passed muster under the statutory procedures. See J.S. 12-13.[5]

b. Appellee contends that the 1983 and 1984 appropriations acts discussed in the jurisdictional statement (at 13-14) do not constitute a ratification of the exercise of enforcement authority by the Commission because there is not a sufficient "nexus" between those statutes and the Executive action, such "that a reviewing court can 'reasonably be able to conclude that the grant of authority contemplate[d]' the action in question" (Mot. to Aff. 10, quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304, 308 (1979)). This contention is wholly without merit. The appropriations acts for fiscal years 1983 and 1984 each provide funds for the "necessary expenses" of the Commission "as authorized by * * * 29 U.S.C. 206(d)" (Pub. L. No. 97-377, 96 Stat. 1874; Pub. L. No. 98-166, 97 Stat. 1088). It is difficult to see how there could be a closer "nexus" between the statutory language providing for the Commission to enforce the Equal Pay Act (29 U.S.C. 206(d)) and the Commission's enforcement action in this case. "The language of the statute is clear, and [the Court has] historically assumed that Congress intended what it enacted." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). This explicit congessional

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[5]Cf. 123 Cong. Rec. 9363, 9364, 9365 (1977) (remarks of Rep. Brown) (proposing amendment to limit a constitutional holding to a single reorganization plan; stating that Congress did not intend for completed reorganization plans to be invalidated); *id.* at 9364 (remarks of Rep. Jordan) (opposing Brown amendment, but expressing "trust [in] the justices of the court to decide the issues and do what is reasonable and sensible and logical").

directive is entitled to no less respect simply because it is contained in an appropriations act. See *United States* v. *Will*, 449 U.S. 200, 222 (1980).[6]

c. Contrary to appellee's contention (Mot. to Aff. 11-12), the circumstances of this case clearly weigh against retroactive application of the decision in *Chadha* to invalidate a completed reorganization plan. This conclusion is supported by all of "the three considerations recognized by [the Court's] precedents as properly bearing upon the issue of retroactivity." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (opinion of Brennan, J.).

First, the decision in *Chadha* involved an issue of first impression, and the holding that the legislative veto device is unconstitutional was not "clearly foreshadowed" by the Court's prior decisions. It does not matter for purposes of this aspect of retroactivity analysis that some Members of Congress expressed doubts about the constitutionality of the legislative veto device during consideration of the Reorganization Act. See Mot. to Aff. 11. Members of Congress also expressed serious reservations about the constitutionality of the jurisdictional provisions of the Bankruptcy Act of 1978, but the Court nevertheless declined to give retroactive effect to its decision in *Northern Pipeline*. See 458 U.S. at 61 n.12, 88 (opinion of Brennan, J.).

Second, retroactive application of *Chadha* in the reorganization context is not necessary to further the operation of the Court's holding that "action taken by one House of Congress * * * violates the strictures of the Constitution" (slip op. 23). The legislative veto authorized by the Reorganization Act of 1977 was not exercised with respect to this

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[6]This case is wholly unlike *TVA* v. *Hill*, 437 U.S. 153 (1978), upon which appellee relies (Mot. to Aff. 9-10); there the lump sum appropriation did not address the legal issue involved. See J.S. 14-15 n.8.

or any other reorganization plan. As a result, here, unlike in *Chadha*, neither House of Congress actually took action to impose its will on persons outside the Legislative Branch in violation of the constitutional requirements of bicameralism and presentment to the President. Nor will either House do so in the future under the Reorganization Act, because the authority conferred by that Act expired in 1981. 5 U.S.C. 905(b). Moreover, the Reorganization Act of 1977 expressly vested the President with authority to implement reorganization plans that were not vetoed by either House of Congress, and the President's "past acts" under that Act therefore are entitled to be "accorded *de facto* validity, just as [the Court has] recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan." *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976). Contrary to appellee's apparent contention (Mot. to Aff. 11), there will be no continuing constitutional problem if the Commission continues to enforce the Equal Pay Act in the future, because the Constitution clearly permits the Commission, as an executive agency, to be vested with that enforcement jurisdiction. Compare *Northern Pipeline, supra; Buckley* v. *Valeo, supra.*

Third, it would be manifestly inequitable to apply *Chadha* retroactively in a way that would invalidate a completed reorganization plan and thereby require this and other suits to be dismissed and the Commission's enforcement activities to be terminated. Congress obviously intended the Equal Pay Act to be enforced by some agency — and specifically by the Commission. Appellee should not be permitted to avoid its obligations and liabilities under that Act by seizing on a latent defect in a different statute, the Reorganization Act, that authorized the transfer of enforcement responsibilities more than four years earlier. Indeed, because the legislative veto authority was never

exercised, appellee can point to no concrete injury resulting from the bare presence of the legislative veto provision in the Reorganization Act that would entitle it to relief.

For the foregoing reasons and the additional reasons set forth in the Jurisdictional Statement, it is respectfully submitted that the Jurisdictional Statement in this case should be held pending a decision in *Heckler* v. *Edwards*, No. 82-874. If the Court concludes in *Edwards* that an appeal does not lie under 28 U.S.C. 1252 where the appellant does not seek review of the district court's holding that a provision in an Act of Congress is unconstitutional, the Court should dismiss the appeal in this case for lack of jurisdiction. In the alternative, if the Court concludes in *Edwards* that a direct appeal must be taken to this Court even where the appellant does not challenge the district court's constitutional holding, the Court should note jurisdiction in this case and reverse the judgment of the district court.

REX E. LEE
Solicitor General

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